Folin & Brothers Sdn Bhd (in liquidation) v Wong Boon Sun & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–76 OF 2003 AND W-02–94 OF 2003
DENIS ONG, TENGKU BAHARUDIN SHAH AND ZALEHA ZAHARI JJCA
8 JULY 2009

Civil Procedure — Committal proceedings — Rules of the High Court 1980 O 52 — Leave to commence committal proceedings — Whether trial judge erred in allowing application to set aside leave — Whether alleged breaches sufficiently particularised — Whether compliance with O 52 r 2(2) mandatory — Whether filing of affidavit in opposition precluded respondents from filing application to set aside — Whether court precluded from hearing application to set aside

Civil Procedure — Notice of motion — Affidavit in support — Deponent had no personal knowledge — Whether affidavit defective

Civil Procedure — Service — Personal service — Restraining order — Whether personal service established

Evidence — Hearsay — Admissibility — Affidavit in support of notice of motion — Statement related to matters that took place more than 13 years — Deponent had no personal knowledge — Whether hearsay

There were two appeals and they were heard jointly. These appeals were directed against the decision of High Court which had allowed the two applications filed at the instance of the respondents. On 8 April 1987, the appellant was wound up by an order of the court. Prior to its winding up, the appellant's affairs were administered by Ramli bin Ibrahim and Geh Cheng Hooi (the second and third respondents in the first appeal and first and second respondents in the second appeal), who were the receivers and managers of the appellant from 18 March 1986 until 8 April 1987. On 12 November 1986, on the application of the petitioning creditor, the court ordered that Wong Boon Sun, one of the receivers and managers, be restrained from managing the business of the appellant and its subsidiary, Folin Food Processing Sdn Bhd. The court order also restrained the receivers and managers from selling, transferring or otherwise dealing with the assets

of the appellant. The appellant in this appeal, commenced committal proceedings against the receivers and managers, Mok Chew Yin (the fourth respondent in the first appeal and third respondent in the second appeal) and Wong Boon Sun. The appellant alleged that the receivers and managers had, on 17 November 1986, handed over 'confidential files containing legal contracts between Folin and its principals' to Wong Boon Sun and thus, breached the court order dated 12 November 1986. The appellant also alleged that Wong Boon Sun had deliberately failed to comply with the above court order. The alleged non-compliance of the court order was the subject matter of committal proceedings against the respondents. The appellant applied leave for committal proceedings against the receivers and managers, Mok Chew Yin and Wong Boon Sun. The appellant filed a statement pursuant to O 52 r 2(2) of the Rules of the High Court 1980 ('the RHC'), as well as an affidavit in support of the notice of motion, in respect of an alleged contempt committed more than 13 years ago. Subsequently, the appellant had, with the approval of the court, made several amendments to this application. These amendments were necessary so as to make clearer the alleged breaches committed by the contemnors and that the respondents were not prejudiced by the proposed amendments. Thereafter, the appellant had deemed it necessary to file an amended statement, as well as two further supporting affidavits as far as the committal proceedings against the receivers and managers was concerned, and an additional affidavit as against the committal proceedings against Wong Boon Sun. The High Court held that the filing of the amended statement, and further affidavits in support of the application for leave to commence committal proceedings after having filed the original notice of motion, contravened O 52 r 2(2) of the RHC, in which the irregularity was fatal. Against the said decision, the appellant appealed to this court.

Held, dismissing both appeals with costs:

(1) The filing of an affidavit in opposition to the substantive motion did not preclude the respondents from filing an application to set aside, nor was the court precluded from hearing such an application as contempt proceedings, being quasi-criminal proceedings, estoppel did not apply (see para 29).

(2) The procedure which an applicant has to comply for an order of committal is as prescribed in O 52. The word 'must' in O 52 r 2(2) means that it is mandatory, and has to be strictly complied with. Order 52 r 2(2) requires an applicant to state the grounds on which the order of committal is sought in the statement accompanying the notice of motion and the affidavit to be filed before the application verifying the facts relied on (see para 30).

(3) The filing of the amended statement, further affidavits after the filing of the original notice of motion, statement and initial affidavit in support contravened O 52 r 2(2) which requires an affidavit in support to be filed before the filing of the notice of motion. The High Court judge was right in ruling that such non-compliance was not a mere irregularity but was fatal (see para 32).

(4) Further, the affidavits filed in support of the notice of motion relates to matters which took place more than 13 years ago in respect of matters which the deponent clearly had no personal knowledge of as the deponent was not the liquidator of Folin at that material point of time (November 1986). The deponent by his own admission relied on information and belief of Wong Sin Fan which was hearsay, which was admittedly based on assumptions and perceptions, which is not evidence (see para 33).

(5) The appellant had also failed to prove that the order alleged to have been disobeyed had been served on the respondents. Based on the materials before the court, the appellant had failed to prove that the order had been personally served on the respective respondents. Further, the alleged breaches had not been sufficiently particularised (see paras 35 & 37).

[Bahasa Malaysia summary

Terdapat dua rayuan di sini dan ianya didengar bersama. Rayuan-rayuan ini terhadap keputusan Mahkamah Tinggi yang membenarkan dua permohonan difailkan bagi pihak responden-responden. Pada 8 April 1987, perayu digulung dengan perintah mahkamah. Sebelum penggulungannya, urus tadbir perayu ditadbir oleh Ramli bin Ibrahim dan Geh Cheng Hooi (responden kedua dan ketiga dalam rayuan pertama dan responden pertama dan kedua dalam rayuan kedua), yang merupakan penerima dan pengurus perayu dari 18 Mac 1986 hingga 8 April 1987. Pada 12 November 1986, atas permohonan daripada pemiutang mempetisyen, mengarahkan Wong Boon Sun, salah seorang penerima dan pengurus, dihalang daripada menguruskan perniagaan perayu dan anak syarikatnya, Folin Food Processing Sdn Bhd. Perintah mahkamah tersebut juga menegah penerima dan pengurus itu daripada menjual, memindah atau mengendali aset-aset perayu. Perayu, dalam rayuan ini, memulakan prosiding komital terhadap penerima dan pengurus, Mok Chiew Yin (responden keempat dalam rayuan pertama dan responden ketiga dalam rayuan kedua) dan Wong Boon Sun. Perayu mendakwa bahawa penerima dan pengurus, pada 17 November 1986 telah menyerahkan '*confidential files containing legal contracts between Folin and its principals*' kepada Wong Boon Sun dan telah melanggar perintah mahkamah bertarikh 12 November 1986. Perayu juga mendakwa bahawa Wong Boon

Sun dengan sengaja tidak mematuhi perintah mahkamah tersebut. Dakwaan ketidakpatuhan terhadap perintah mahkamah itu merupakan intipati prosiding komital terhadap responden-responden. Perayu memohon keizinan untuk prosiding komital terhadap penerima dan pengurus, Mok Chiew Yin dan Wong Boon Sun. Perayu memfailkan suatu penyataan berikutan A 52 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), bersama dengan afidavit sokongan notis usul, berkaitan dengan dakwaan penghinaan yang dilakukan lebih 13 tahun dahulu. Kemudiannya, dengan keizinan mahkamah, perayu telah meminda permohonan ini. Pindaan-pindaan ini adalah perlu bagi menjelaskan lagi dakwaan pelanggaran-pelanggaran yang telah dilakukan dan juga bahawa responden-responden tidak diprejudiskan dengan cadangan pindaan-pindaan tersebut. Maka, perayu beranggapan bahawa adalah perlu untuk memfailkan suatu penyataan pindaan, bersama dengan dua afidavit sokongan berikutan dengan prosiding komital terhadap penerima dan pengurus tersebut, dan satu afidavit tambahan terhadap prosing komital terhadap Wong Boon Sun. Mahkamah Tinggi memutuskan bahawa pemfailan penyataan pindaan tersebut dan juga afidavit-afidavit sokongan bagi permohonan keizinan untuk memulakan prosiding komital selepas memfailkan notis usul, menyalahi A 50 k 2(2) KMT, yang mana luar aturan itu membawa padah. Maka, perayu merayu terhadap keputusan tersebut.

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Pemfailan afidavit bantahan terhadap usul substantif tidak mengecualikan responden-responden daripada memfailkan permohonan untuk pengetepian, dan mahkamah juga tidak dikecualikan daripada mendengar permohonan seperti prosiding menghina itu, yang merupakan prosiding jenayah quasi, estopel tidak diguna pakai di sini (lihat perenggan 29).

(2) Prosedur di mana pemohon perlu mematuhi perintah komital adalah dinyatakan dalam A 52. Perkataan 'mesti' dalam A 52 k 2(2) bermaksud mandatori, dan harus diikut dengan ketat. Aturan 52 k 2(2) mengkehendaki pemohon menyatakan alasan-alasan mengapa perintah komital itu dipohon dalam penyataan yang dilampirkan bersama notis usul dan afidavit tersebut mestilah difailkan sebelum permohonan tersebut, mengesahkan fakta-fakta yang diguna pakai (lihat perenggan 30).

(3) Pemfailan penyataan pindaan, afidavit-afidavit lanjutan selepas pemfailan notis usul yang asal, penyataan dan afidavit sokongan asal bercanggah dengan A 52 k 2(2) yang memerlukan afidavit sokongan itu difailkan sebelum notis usul itu difailkan. Hakim Mahkamah Tinggi

adalah betul apabila memutuskan bahawa ketidakpatuhan tersebut bukanlah luar aturan semata-mata tetapi membawa padah (lihat perenggan 32).

(4) Tambahan lagi, afidavit-afidavit yang difailkan untuk menyokong notis usul itu adalah berkaitan dengan perkara yang telah berlaku 13 tahun lalu yang mana pengikrar tersebut tidak tahu menahu mengenainya kerana pengikrar itu bukanlah likuidator Folin pada waktu yang material tersebut (November 1986). Pengikrar, atas pengakuannya, bergantung kepada maklumat dan keprcayaan Wong Sin Fan, yang mana merupakan dengar cakap, dan diakui ia berdasarkan anggapan dan persepsi, yang mana bukanlah keterangan (lihat perenggan 33).

(5) Perayu juga gagal membuktikan bahawa perintah yang didakwa telah dilanggar oleh responden-responden telah diserahkan kepada mereka. Berdasarkan material-material di hadapan mahkamah ini, perayu gagal membuktikan bahawa perintah tersebut telah diserahkan secara peribadi kepada responden-responden. Malah, dakwaan pelanggaran-pelanggaran itu tidak diperincikan (lihat perenggan 35 & 37).]

Notes

For cases on admissibility of hearsay evidence, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1578–1580.

For cases on committal proceedings generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1675–1676.

For cases on notice of motion generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4835–4836.

For cases on service generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6171–6320.

Cases referred to

Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239, HC (refd)

Ronson Products Ltd v Ronson Furniture Ltd [1966] Ch 603 (refd)

Legislation referred to

Rules of the High Court 1980 O 52, O 52 rr 2(2), 3

Appeal from: Company Winding up Petition No 66 of 1980 (High Court, Kuala Lumpur)

K Kirubakaran (David Mather and Prakash Lachimanan with him) (Mathew Hun Kandiah) for the appellant.

JS Gill (Putra Gill) for the first respondent.

Tang Who Heng (Arifin & Partners) for the second, third and fourth respondents.

Zaleha Zahari JCA (delivering judgement of the court):

[1] Appeal No W-12–76 of 2003 and Appeal No W-02–14 of 2003 were heard jointly. These appeals were directed against the decision of Kuala Lumpur High Court judge dated 27 November 2002 in allowing two applications filed at the instance of the respondents (encll (258) and (260)). The unanimous decision of this court was to affirm the decision of the High Court judge and to dismiss both of the appeals with costs. Our reasons are as follows.

BACKGROUND

[2] The background facts are these. Folin & Brothers Sdn Bhd ('Folin') was wound up on 8 April 1987 by order of court on the application of a contributory, Wong Kee Chong, vide Kuala Lumpur High Court Winding Up Petition No 66 of 1980 ('the winding up petition'). In the course of, and pending judgment on the winding up petition, several interlocutory applications were filed and orders issued in respect of them. Judgment on the winding up petition was delivered on 8 April 1987 and Folin was wound up.

[3] Prior to its winding up, Folin's affairs were administered by Ramli bin Ibrahim ('Ramli') and Geh Cheng Hooi ('Geh') (the second and third respondents in Appeal No W-02–76 of 2003 and first and second respondents in Appeal No W-02–94 of 2003), who were the receivers and managers of Folin for the period 18 March 1986 until 8 April 1987 ('the receivers and managers').

[4] On 12 November 1986, on the application of the petitioning creditor, the court ordered that Wong Boon Sun ('Wong') be restrained from managing the business of Folin and its subsidiary, Folin Food Processing Sdn Bhd in whatever capacity or manner. The court also ordered that the receivers and managers be restrained from selling, transferring or otherwise dealing with the assets of Folin so as to defeat the purpose and intent of the winding up petition until judgment is delivered on the petition. The alleged non-compliance of this court order dated 12 November 1986 is the subject matter of committal proceedings against the respondents on the application of Ng Pyak Yeow and Dato' Khoo Peng Lai (the present liquidators of Folin and appellants in this appeal).

[5] The High Court judge's decision in allowing the respondent's application to set aside the leave granted by the court on 14 July 2000 to commence committal proceedings against the respondents, were the subject matter of the present appeals.

[6] What led the appellants to commence committal proceedings against the receivers and managers and Mok Chew Yin (the fourth respondent in Appeal No W-02–76 of 2003 and the third respondent in Appeal No W-03–94 of 2003) and Wong was this. The appellants were appointed as liquidators of Folin by court order dated 13 March 1997, replacing Ahmad Kamal Al Ayfii and Zainal Abidin Puteh ('the second liquidators'), who were retiring from office. The second liquidators were appointed in substitution of the original liquidators ('first liquidators') who were appointed upon the issuance of the winding up order on 8 April 1987.

[7] Between the period 1997 to 2000 the appellants attempted to obtain information, Folin's documents and locate Folin's assets from the receivers and managers. A letter dated 20 August 1997 was issued to the receivers and managers requesting them to furnish a comprehensive account of all transactions and dealings of Folin's assets from the date of their appointment, as well as the documents under their control or custody. The appellants contended that the receivers and managers response to their request were inadequate and evasive.

[8] The receivers and managers had by letter dated 7 April 2000 informed the appellants that their solicitors had served a bundle of documents on Folin's solicitors in respect of Kuala Lumpur Civil Suit No D4–22–1464 of 1990. Upon perusal of the documents contained in the said bundle of documents the appellants took the view that the receivers and managers had given Wong Sin Fan (one of Folin's director) a run-a-round when he tried to get information and documents pertaining to Folin's agencies. When the receivers and managers handed over Folin's records to the first liquidators, the receivers and managers did not hand over files relating to Folin's agencies.

[9] Wong Sin Fan had on 11 April 2000, handed to the appellants a letter dated 12 July 1986 written by Wong to the receivers and managers, which letter had not been given to them by the receivers and managers, nor was this letter included in the bundle of documents submitted in April 2000. This letter, inter alia, states as follows:

> This is to put on record that I have given to you and Mr Kevin Ng yesterday the company's files and records under my care for the purposes of allowing Mr Wong Sin Fan to review them this morning.
>
> Please note the files given to your care are confidential files containing legal contracts between the company and its principals. If any of the files or documents thereof is missing, it is your responsibility.
>
> Further I would like to lodge my protest as well as my staff in the company concerning the behaviour of Mr Wong Sin Fan. Whilst we can appreciate that as a director, he has certain rights, he has consistently made ill use of this privilege. I would also like to convey my strong protest that his consistent demands to view records is only to steer up trouble.

> Whilst practically all the working files of the company are up in your room for his view and inspection for months, he has not even taken trouble to look at them in the first place.
>
> He has consistently demand to see files but when the files were at his disposal, he did not even look at them. This constant harassment is wearing my patience as well as other directors. For peace sake, could you please restrict such constant interference by him in the company.

[10] On this letter dated 12 July 1986 the appellants observed a handwritten note: 'All files returned to WBS at 4.30pm on 17 November'. This handwritten note was construed by the appellants to mean that the receivers and managers had, at 4.30pm on 17 November 1986, handed over 'confidential files containing legal contracts between Folin and its principals' (the agency contracts) to Wong. The appellants took the view, despite having been served and having knowledge of the order dated 12 November 1986, the receivers and managers and Mok (the person who wrote the handwritten note), was in breach of the order dated 12 November 1986 by handing over files relating to Folin's agency contracts to Wong and accordingly were guilty of contempt. The appellants' case was that by handing over files pertaining to Folin's assets to Wong, the receivers and managers had breached court order dated 12 November 1986 which restrained them from 'selling, transferring and or otherwise dealing with the assets of Folin'. In doing so, the appellants alleged that the receivers and managers had dealt with Folin's agencies in a manner calculated to defeat the purpose and intent of the winding-up petition, and were guilty of aiding and abetting Wong in participating in the management of Folin and its subsidiary. The receivers and managers had also failed to take steps to retrieve and/or recover the same from Wong.

THE COMMITTAL PROCEEDINGS

[11] The appellants then, vide an ex parte notice of motion encl (234) filed on 17 April 2000 ('the original notice of motion'), applied for leave to commence committal proceedings under O 52 of the Rules of the High Court 1980 ('the RHC') against the receivers and managers and Mok. On the same date they filed a statement pursuant to O 52 r 2(2), as well as an affidavit in support of the notice of motion, (ie that affirmed by Ng Pyak Yeow on 17 April 2000) in respect of an alleged contempt committed more than 13 years ago.

[12] The prayers sought by the appellants in the original notice of motion against the receivers and managers and Mok states as follows:

(1) Ng Pyak Yeow and Khoo Peng Lai, Joint Liquidators of Folin and Brothers Sdn Bhd (In Liquidation) be at liberty to commence

proceedings to commit Ramli bin Ibrahim and Geh Cheng Hooi to prison:

(a) on account of the alleged act(s) of contempt committed by the said Ramli bin Ibrahim and Geh Geng Hooi in willfully disobeying an injunction issued by this honourable court on 12.11.1986 against the said Ramli bin Ibrahim and Geh Cheng Hooi restraining them as receivers and managers of Folin & Brothers Sdn Bhd from '… selling, transferring or otherwise dealing with the assets ...' of Folin & Brothers Sdn Bhd; and/or

(b) on account of the alleged act(s) of contempt committed by the said Ramli bin Ibrahim and Geh Geng Hooi in aiding and abetting Wong Boon Sun to disobey an injunction issued by this honourable court on 12-11-1986 against the said Wong Boon Sun restraining him from, inter alia, managing the business of Folin & Brothers Sdn Bhd (in liquidation) in whatever capacity and/or manner.

and

(2) Ng Pyak Yeow and Khoo Peng Lai, joint liquidators of Folin & Brothers Sdn Bhd (In Liquidation) be at liberty to commence proceedings to commit Mok Chew Yin to prison:

(a) on account of the alleged act(s) of contempt committed by the said Mok Chew Yin in aiding and abetting the said Ramli bin Ibrahim and Geh Cheng Hooi to disobey an injunction issued by this Honourable Court on 12-11-1986 against the said Ramli bin Ibrahim and Geh Cheng Hooi restraining them as receivers and managers of Folin and Brothers Sdn Bhd from '… selling, transferring or otherwise dealing with the assets' of Folin and Brothers Sdn Bhd; and/or

(b) on account of the alleged act(s) of contempt committed by the said Mok Chew Yin in aiding and abetting, Wong Boon Sun to disobey an injunction issued by this Honourable Court on 12-11-1986 against the said Wong Boon Sun restraining him from, inter alia, 'managing the business of Folin and Brothers Sdn Bhd (In Liquidation) in whatever capacity and/or manner.'

and

(3) That provision be made for all costs of and incidental to this application to be in the cause of the intended committal proceedings or alternatively that all costs of and incidental to this application be part of the costs of the liquidation of Folin and Brothers Sdn Bhd (In Liquidation) and be paid out of the assets of Folin and Brothers Sdn Bhd (In Liquidation);

and

(4) That the court do make such other order that it deems fit and just.

[13] Subsequently, on 4 May 2000, vide notice of motion in terms of encl (238), the appellants applied for a similar order against Wong. The appellants alleged that Wong had deliberately not complied with court order dated 12 November 1986 restraining him from managing the business of Folin or its subsidiary in whatever capacity and/or any manner. The grounds held out in the statement pursuant to O 52 r 2(2) and the affidavit filed in support of the said application against Wong was similar to that filed in respect of the application for committal against the receivers and managers and Mok.

[14] On 28 June 2000 the appellants filed encl (241), an ex parte application to amend both of the statements filed in respect of the applications for leave to commence committal proceedings against the receivers and managers and Mok, and that as against Wong. The need to move the amendments, according to the appellants, was so that the conduct allegedly committed by the alleged contemnors would be stated more clearly, made bona fide, and the respondents would not be prejudiced by the proposed amendments.

[15] On the same date, 28 June 2000, the appellants filed a supplementary affidavit affirmed on 28 June 2000 (encl (239)) in support of application for leave to commence committal proceedings against the receivers and managers and against Mok. On 30 June 2000 the appellants filed a second supplementary affidavit affirmed by Ng Pyak Yeow in support of the application as against the receivers and managers. A supplementary affidavit affirmed by Ng on 28 June 2000 was also filed by the appellants in respect of the application for leave to commence committal proceedings against Wong.

[16] On 14 July 2001 Yaacob bin Haji Ismail J, allowed the appellants' ex parte application to amend the statement applied in encl (241).

[17] On 18 July 2000, pursuant to the leave granted to amend the statements obtained on 17 April 2001 in respect of the committal proceedings against the receivers and managers and as against Wong, the appellants filed amended statements against the receivers and managers and Mok, as well as an amended statement as against Wong. The amended statements filed pursuant to O 52 r 2(2) of the RHC against the respondents is reproduced for ease of reference.

AMENDED STATEMENT AGAINST THE RECEIVERS AND MANAGERS AND MOK

[18] The amended statement states as follows:

4. The applicants seek leave to commence proceedings to commit:

   4.1 RAMLI BIN IBRAHIM (IC No: 400811–10–5117) of No. 15, Jalan Balau, Bukit Damansara, 50490 Kuala Lumpur.

   4.2 GEH CHENG HOOI (IC No: 340906–07–5019) of No. 46, Jalan Batai, Damansara Heights, 50490 Kuala Lumpur.

   4.3 MOK CHEW YIN (IC No: 540331–10–5817) of No. 12, Jalan BU 21, Bandar Utama, 47800 Petaling Jaya, Selangor Darul Ehsan

5. Ramli bin Ibrahim ('Ramli') and Geh Cheng Hooi ('Geh') were the receivers and managers of the said company and were appointed by Standard Chartered Bank pursuant to a debenture dated 18-3-1986.

6. At all material times Ramli and Geh were partners in accounting firm, Peat Marwick Mitchell & Co ('PMM').

7. Mok Chew Yin ('Mok') was at all material times a manager employed by PMM and an agent to Ramli and Geh with respect to the daily administration of the said company.

8. The reliefs sought against Ramli and Geh are that Ng Pyak Yeow and Khoo Peng Lai, the Joint Liquidators of Folin & Brothers (In Liquidation) be given leave to commence committal proceedings:

   (a) On account of the alleged act(s) of contempt committed by Ramli and Geh in willfully disobeying an injunction issued by this Honourable Court dated 12-11-1956 against the said Ramli and Geh which restrained them as receivers and managers of Folin Brother Sdn Bhd from '… selling, transferring and/or otherwise dealing with the assets' of Folin & Brothers Sdn Bhd;

   and/or

   (b) on account of the alleged act(s) of contempt committed by Ramli and Geh in aiding and abetting Wong Boon Sun in willfully disobeying an injunction issued by this Honourable Court dated 12-11-1986 against the said Wong Boon Sun which restrained him from, inter alia, managing the business of Folin & Brothers Sdn Bhd in whatever capacity and or manner.

9. The said Wong Boon Sun at all material of times the manager of the said company. His address is at No 154, Jalan 5/42, 46000 Petaling Jaya, Selangor Darul Ehsan.

10. The reliefs prayed against the said Mok are as follows:

10.1 That Ng Pyak Yeow and Khoo Peng Lai, the joint liquidators of Folin & Brothers Sdn Bhd (In Liquidation) be granted leave to commence proceedings to commit Mok Chew Yin to prison:

(a) On account of the alleged act(s) of contempt committed by the said Mok in aiding and abetting the said Ramli and Geh in willfully disobeying an injunction issued by this Honourable Court on 12-11-1986 against the said Ramli and Geh which restrained them as receivers and managers of Folin Brothers Sdn Bhd from '… selling, transferring and/or otherwise dealing with the assets' of Folin Brothers Sdn Bhd; and/or

(b) On account of the alleged act(s) of contempt committed by the said Mok in aiding and abetting Wong Boon Sun in willfully disobeying an injunction issued by this Honourable Court on 12.11.1986 against the said Wong Boon Sun which restrained him from, inter alia, managing the business of Folin Brothers Sdn Bhd in whatever capacity and/or manner.

11. The applicants alleged that the said Ramli, Geh and Mok are in contempt by reason of them having on or before 17.11.1986 (after the said injunction order) willfully allowed the said Wong Boon Sun to operate the agencies belonging to the said company and siphone the assets of Folin namely the agencies and files and documents pertaining to the agencies for his own benefit. The said agencies and files and documents pertaining to the same from the assets of the said company. Ramli, Geh and Mok had transferred or otherwise dealt with the assets of Folin and/or aided and abetted Wong Boon Sun in managing the business of Folin.

12. Further, it is alleged that the Ramli, Geh and Mok are in contempt by reason of them willfully allowing the said Wong Boon Sun continue to operate the business of the said company even after having the notice of the said injunction. Accordingly, it can be said that Ramli, Geh and Mok had aided and abetted the said Wong Boon Sun in managing the business of Folin.

13. Ramli, Geh and Mok have both jointly and individually willfully disobeyed the said injunction dated 12.11.1986 and are in contempt of this Honourable Court.

AMENDED STATEMENT DATED 4 MAY 2000 AGAINST WONG BOON SUN

[19] The amended statements states as follows:

4. The applicants seek for leave to commence proceedings against to commit Wong Boon Sun (I/C No: 461030–10–5439) of No. 154, Jalan 5/42, Petaling Gardens, 46000 Petaling Jaya, Selangor Darul Ehsan.

5. Wong Boon Sun was at all material times the manager of Folin & Brothers Sdn Bhd together with his father, Wong Foh Ling managed the business of Folin & Brothers Sdn Bhd.

6. The reliefs sought against Wong Boon Sun are as follows:

   6.1 That Ng Pyak Yeow and Khoo Peng Lai, the joint liquidators of Folin & Brothers (In Liquidation) be given leave to commence proceedings to commit Wong, Boon Sun to prison:

   (a) on account of the alleged act(s) of contempt committed by Wong Boon Sun in willfully disobeying an injunction issued by this Honourable Court dated 12-11-1986 against the said Wong Boon Sun restraining him from, inter alia, 'managing the business of Folin & Brothers Sdn Bhd in whatever capacity and/or manner'; and/or

   (b) on account of the alleged act(s) of contempt committed by Wong Boon Sun in aiding and abetting Ramli bin Ibrahim and Geh Cheng Hooi in willfully disobeying an injunction issued by this Honourable Court dated 12-11-1986 against Ramli bin Ibrahim and Geh Cheng Hooi which restrained them as receivers and managers of Folin & Brothers Sdn Bhd (In Liquidation) from '… selling, transferring and/or otherwise dealing with the assets of Folin & Brothers Sdn Bhd (In Liquidation);

7. At all material times, Ramli bin Ibrahim and Geh Cheng Hooi were receivers and managers of Folin & Brothers Sdn Bhd (In Liquidation). An application for leave to commence committal proceedings against them was filed on 17-4-2000.

8. The applicants alleged that the said Wong Boon Sun is in contempt by reason of him willfully operating and siphoning the agencies belonging to Folin and its subsidiary, Folin Food Processing Sdn Bhd for his own benefit including *the files and documents belonging to Folin pertaining to the said agencies*. The said agencies *and the files and*

documents, pertaining to the same pertaining to the same from part of the assets of the said company. As such Wong Boon Sun had been involved with the management of Folin & Brothers Sdn Bhd and/or aided and abetted Ramli bin Ibrahim and Geh Cheng Hooi to transfer or otherwise deal with the assets of Folin.

9. Despite of the said order, Wong Boon Sun had regularly attended at the premises of Folin & Brothers Sdn Bhd (In Liquidation) and Folin Food Processing Sdn Bhd and managed the daily activities of the said companies.

10. Wong Boon Sun had deliberately and willfully disobeyed the said injunction dated 12.11.1986 and is in contempt of this Honourable Court.

[20] Based on Ng Pyak Yeow's affidavit affirmed on 17 April 2000, supplementary affidavit affirmed on 28 June 2000, and second supplementary affidavit affirmed on 30 June 2000 and the amended statement filed on 18 July 2001, the High Court judge on 14 July 2000 granted an order in terms of the application in encl (234). An order in terms was also granted in respect of the appellants' application in encl (238) based on the affidavit of Ng Pyak Yeow affirmed on 4 May 2000, supplementary affidavit affirmed on 28 June 2000, and the amended statement filed on 18 July 2001.

[21] The substantive notice of motion for a committal order against the receivers and managers and Mok, and that as against Wong, filed on 25 July 2000 ie (encll (250) and (248) respectively) and the affidavit in support had been duly served on the respective respondents.

[22] The respondents have filed their respective affidavits in reply in opposition to the committal proceedings instituted against them. The respondents also filed an application to set aside the order granting leave to commence committal proceedings against them.

THE APPLICATION TO SET ASIDE

[23] On 9 March 2001 the receivers and managers and Mok, vide encl (258), applied to set aside the order granting the appellants leave to commence committal proceedings against them on the following grounds:

1. The Applicants failed to comply with the strict requirements of Order 52 rule 2(2) of the Rules of the High Court 1980 in that:

(a) the affidavits affirmed by Ng Pyak Yeow on 17 April 2000 [enclosure 233], on 28.6.2000 [enclosure 239] and on 30.6.2000 [enclosure 240] and filed in support of the application for leave is defective for non-compliance with Order 41 Rule 1(7) & (8), and may not be used in evidence and accordingly the application for leave was not supported by any affidavit filed before the application verifying the facts relied upon, and

(b) the Amended Statement does not contain any information or particulars of the acts which it is alleged constitute a breach of the Order and therefore amounts to acts of contempt, and

2. the Applicants failed to specify any act which it is alleged breached the Order and constitutes an act of contempt, and to provide any particulars in respect of:

(a) what and which assets of the Company, identifying the same, it is alleged Ramli bin Ibrahim [Ramli], Geh Cheng Hooi [Geh] and Mok Chew Yin [Mok] sold, transferred and or otherwise dealt with, and to whom, when and where it is alleged the sale or transfer took place, and

(b) what and which agencies, identifying the same, it is alleged Ramli, Geh and Mok sold, transferred and or otherwise dealt with, and to whom, when and where it is alleged the sale or transfer took place, and

(c) what and which files and documents, identifying the same, it is alleged Ramli, Geh and Mok allowed Wong Boon Sun (hereinafter referred to as WBS) to take out or otherwise dealt with, and giving details when and where it is alleged the same took place, and

(d) what are the acts it is alleged WBS committed which it is alleged constitute managing the business affairs of the Company, and

(e) In what manner and how it is alleged that Ramli, Geh and Mok aided and abetted WBS.

3. the Applicants have no personal knowledge of the facts and they relied on the information and belief of Wong Sin Fan that by Wong Sin Fan's own admission was based on assumptions and perceptions that is not evidence, and

4. it is settled law that assumptions, perceptions and suspicions cannot be evidence, and the Applicant failed to establish a prima facie case, and

5. the ex parte application for leave is an abuse of the process of this court, and

6. the other grounds are set out in the affidavit of Mok Chew Yin affirmed on 8.3.2001 and filed in support of this application.

[24] Wong had also, vide notice of motion dated 9 March 2001 (encl (260)), applied to set aside the court order dated 14 July 2000 granting leave to the appellants to commence committal proceedings against him. Wong contended that the appellants had failed to strictly comply with O 52 r 3. The amended statement did not particularise the acts constituting contempt which allegedly had contravened court order dated 12 November 1986. Wong then raised the following questions. Whether the order dated 12 November 1986 was served on him personally? In the event the order dated 12 November 1986 had not been served on him, when and how was he put to notice of the order which he is alleged to have infringed? What were the acts allegedly committed by him as involving in the management of the affairs of Folin? What and where the files and documents allegedly taken out by him, or dealt with, and with whom, when, and where the dealings took place? What were and where the agencies allegedly taken out or dealt with by him and with whom, when and where the dealings took place? How, what and in what manner he had assisted the receivers and managers?

[25] Wong also raised the issue that the deponent of the affidavits filed in support of the application for leave to commence committal proceedings had no personal knowledge of the matters averred to therein but was relying on what was related to the deponent by Wong Sin Fan, constituting hearsay. The said Wong Sin Fan had himself admitted that his beliefs were based on suspicions and presumptions, which cannot be accepted proof. Wong contended that the appellants had accordingly not proved a prima facie case against him and the committal proceedings was an abuse of the process of the court.

THE HIGH COURT JUDGE'S DECISION

[26] On 27 November 2002 the application to set aside the order granting leave dated 14 July 2000 in encll (258) and (260) was allowed by a different High Court judge for the following reasons. The High Court judge ruled that the filing of an amended statement, and further affidavits in support of the application for leave to commence committal proceedings after having filed the original notice of motion, contravened O 52 r 2(2) of the RHC, which irregularity was fatal.

[27] He agreed with the submission of counsel acting for respondents' that as the deponent of the affidavits filed in support of the leave application for committal was based on information from a third party constituting hearsay.

The filing of supplementary affidavits to improve the initial affidavit filed in support the application in the first instance was prejudicial to the respondents. There was also no evidence that the order alleged to have been in breach had been personally served on the respondents, which was a mandatory requirement in committal proceedings.

DECISION

[28] On the preliminary issue whether the respondents were precluded from filing an application to set aside after having filed their respective affidavits in opposition to the substantive notice of motion for committal which had been filed, the appellants argument was that as the respondents had filed affidavits in reply to the allegations of contempt in the substantive motion, they were precluded from applying to set aside the order granting leave to commence committal proceedings. The issues raised by the respondents should be decided at the substantive hearing of notice of motion for committal on its merits.

[29] We are not in agreement with the appellant's submission. We agree with the learned judge, that the filing of an affidavit in opposition to the substantive motion does not preclude the respondents from filing an application to set aside, nor was the court precluded from hearing such an application as contempt proceedings, being quasi-criminal proceedings, estoppel does not apply.

[30] Our views on the other procedural challenges raised by the respondents are as follows. The procedure which an applicant has to comply for an order of committal is as prescribed in O 52. The word 'must' in O 52 r 2(2) means that it is mandatory, and has to be strictly complied with. Order 52 r 2(2) requires an applicant to state the grounds on which the order of committal is sought in the statement accompanying the notice of motion and the affidavit to be filed before the application verifying the facts relied on.

[31] On the facts of this case, after the filing of the original notice of motion, original statement, and initial affidavit in support of the application, the appellants have deemed it necessary to file an amended statement, as well as two further supporting affidavit as far as the committal proceedings against the receivers and managers is concerned, and an additional affidavit as against the committal proceedings against Wong.

[32] We are in agreement with the High Court judge that the filing of an amended statement, the filing of further affidavits after the filing of the original notice of motion, statement and initial affidavit in support contravenes O 52 r 2(2) which requires an affidavit support to be filed before

A the filing of the notice of motion. The High Court judge was right in ruling that such non compliance was not a mere irregularity but was fatal.

WHETHER THE AFFIDAVITS FILED IN SUPPORT OF THE APPLICATION DEFECTIVE?

B

[33] The affidavits filed in support of the notice of motion relates to matters which took place more than 13 years ago in respect of matters which the deponent clearly had no personal knowledge of as the deponent was not C the liquidators of Folin at that material point of time (November 1986). The deponent by his own admission relied on information and belief of Wong Sin Fan which was hearsay, which was admittedly based on assumptions and perceptions, which is not evidence.

D WHETHER PERSONAL SERVICE OF ORDER DATED 12 NOVEMBER 1986 HAD BEEN EFFECTED ON THE RESPONDENTS?

E **[34]** The appellants must show beyond reasonable doubt that the alleged acts or acts amounted to disobedience of that court order. The contempt was alleged to have been committed by the receivers and managers and Mok and by Wong on 17 November 1986 at 4.30pm. It was therefore incumbent upon the appellants to produce evidence before the court that the alleged acts took F place after the order in issue was either served, or made known to the respective respondents. The rationale for this as stated by Stamp J in *Ronson Products Ltd v Ronson Furniture Ltd* [1966] Ch 603 at p 614 was, 'If a man be ordered to do an act, so that his failure to do it may lead him to prison, justice requires that he knew precisely what he has to do and by what time G he has to do it ...'.

In *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 at p 242 Edgar Joseph J (as he then was) held:

> H Now, it is well-settled law that contempt of court is an offence of a criminal character since the liberty of the alleged contemnor is at stake. That being so, it is fundamental that a man ought not to be penalized unless he has both a fair opportunity to comply with the law and the capacity to do so. Any other approach would not only be morally objectionable but also should have no place in a legal system based on ideas of fair play and justice.

I

[35] Based on the evidence before him the judge's finding was that the appellants had failed to prove that the order alleged to have been disobeyed had been served on the respondents. The appellant's letter dated 17 November 1986 (ie the date when the alleged contempt took place (exh NPY

14)) enclosing a copy of the draft order was not accepted as evidence that the receivers and managers, Mok as well as on Wong, had notice of the order as at that point of time.

We agree. Based on the material before the court the appellants had failed to prove that the order had been personally served on the respective respondents before 4.30pm on 17 November 1986.

WHETHER ALLEGED CONDUCT CONSTITUTING CONTEMPT SUFFICIENTLY PARTICULARISED?

[36] On this issue every notice of application for leave for contempt must necessarily be considered against its own background. Whether the appellants succeed or fail is based upon the particulars contained in the statement. The notice must state with sufficient particularity the alleged breaches to enable the alleged contemnor to defend himself. The alleged contemnor is not required to extract and cull for himself from a historical narrative in the affidavit relevant dates and time to work out for himself the precise breaches alleged, and the occasions on which they took place.

[37] In our considered opinion the alleged breaches had not been sufficiently particularised. We are further of the view that the act of returning files for safekeeping, and storage to the room where they were previously kept for safekeeping, cannot constitute 'managing the business of Folin', nor does it constitute, 'selling, transferring or otherwise dealing with the assets of Folin', and as contravention of court order dated 12 November 1986. We are in agreement with the respondents' counsel that the restraining orders dated 12 November 1986 ceased to have effect, consequential upon judgment on the winding-up petition being delivered on 8 April 1987, the date when Folin was ordered to be wound up. There can be no breach of the order after 8 April 1987.

[38] To conclude, the procedural objections raised by the respondents in the applications to set aside were warranted. The High Court judge was right in finding that the leave to commence committal proceedings ought not to have been granted, and in setting aside the said order. For the above mentioned reasons the appeals were dismissed with costs. The deposits to the respondents to account of taxed costs.

Appeals dismissed with costs.

Reported by Ashgar Ali Ali Mohamed